Nos. 18-1685/18-1706

In the United States Court of Appeals for the Sixth Circuit

AIRGAS USA, LLC,
Petitioner Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD
Respondent Cross-Petitioner.

On Appeal from the National Labor Relations Board

PETITION FOR PANEL REHEARING

Michael C. Murphy
AIRGAS, INC.
259 N. Radnor-Chester Road
Radnor, PA 19087
(215) 990-4867
michael.murphy@airgas.com

Counsel for Petitioner Cross-Respondent Airgas USA, LLC

ORAL ARGUMENT REQUESTED

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 18-1685/18-1706 Case Name: Airgas USA LLC v. National Labor Relations Board

Name of counsel: Michael C. Murphy

Pursuant to 6th Cir. R. 26.1, Airgas USA, LLC
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Airgas USA, LLC is a wholly owned subsidiary of AIrgas, Inc.; Airgas, Inc. is an indirect wholly owned subsidiary of L'Air Liquide S.A., which is a public company whose share are listed on the Paris Euronext stock exchange. Airgas, Inc. hs no other "grandparent" or "great grandparent" corporations that are publicly traded.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on January 29, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Michael C. Murphy

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

6CA-1
8/08

Page 1 of 2

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Code of Federal Regulations

ISSUES PRESENTED FOR REVIEW

The NLRB found that Airgas violated Section 8(a)(4) of the National Labor Relations Act only by ignoring substantial parts of the record and basing its animus finding on the absence of proof rather than affirmative evidence. An unpublished decision of this panel approved the Board's action. Because the panel decision conflicts with Supreme Court precedent and two statutory mandates and presents an issue of exceptional importance, panel rehearing is warranted.

Because a pretext finding truncates the *Wright Line* analysis, the finding must rely on some affirmative evidence; a pretext finding based entirely on the absence of proof, by contrast, does not just shorten the *Wright Line* decisional analysis, it also upends the burdens of proof mandated by the National Labor Relations Act, the Administrative Procedure Act and United States Supreme Court's *Greenwich Colliers* decision. Furthermore, NLRB only reached its holding by ignoring large segments of the record to reach this holding, so the panel decision upholding the Board is also in conflict with 6th Circuit precedent. Accordingly, because the panel decision conflicts with Supreme Court

and 6th Circuit precedent and two statutory mandates, this Court should grant rehearing.

COURSE OF PROCEEDINGS AND STATEMENT OF FACTS

Airgas, the largest supplier of industrial and medical gases in the United States, employs drivers and operators in the packaging and delivery of hazardous pressurized gases.[1]

On August 7, 2013 Stephen P. Rottinghouse, an Airgas driver domiciled at the 10031 Cincinnati-Dayton Road Airgas fill plant ("Cinday plant") filed an unfair labor practice charge (case 09-CA-110721) alleging Airgas violated Sections 8(a)(3) and (1) by disciplining him and changing his hours in retaliation for his grievance filing and other unspecified protected activity.[2]

Twenty-one months later, on May 14, 2015, Rottinghouse filed another unfair labor practice charge (case 09-CA-152301) alleging Airgas violated Section 8(a)(1) of the Act when Operations Manager Clyde Froslear threatened to change terms of employment because Rottinghouse "filed grievances and filed charges with the National Labor Relations Board."[3]

---

[1] JA 444.
[2] JA 240.
[3] JA 243. Despite Rottinghouse's allegation, there is no record evidence of Rottinhouse filing an unfair labor practice charge anytime in the 21 months prior to the filing of the charge in Case 09-CA-152301. And though the ALJ seemed to attach some significance to the terms of the settlement agreement that Airgas

In the summer of 2015, Rottinghouse began displaying a pattern of deficient adherence to Airgas safety and DOT compliance protocols. It started on June 22, 2015, when Rottinghouse deliberately clocked out to avoid a work assignment but then continued working off the clock in violation of Airgas work rules and DOT Regulations. After an investigation, Airgas imposed a three-day disciplinary suspension on Rottinghouse on June 26, 2015.[4]

That same day, Rottinghouse amended the ULP charge in case 09-CA-152301 to include 8(a)(3) and 8(a)(4) allegations.[5]

---

signed in order to resolve that matter, this panel has previously only been presented with one reference to the facts of that case when Counsel for the General Counsel cited to docket web-page of case 09-CA-152301 in its brief in this matter in order to demonstrate to this Court that the case was still pending at that time. (GC Brief p. 7, fn. 5). Since that time, however, Airgas, through its filings in case 09-CA_152301, has been able to document how Region 9 threatened Airgas that if it did not settle 09-CA-152301 on terms dictated by Region 9, then the Region would issue a complaints not just in 09-CA-152301 but in an older case as well (one that Airgas had already settled and that should have been closed on compliance). Moreover, since the GC's brief was submitted in this matter, Airgas has successfully overcome a motion for default judgement, detailed Region 9's whipsaw tactics in its filings, obtained dismissal of a hastily issued complaint and secured closure on compliance in case 09-CA-152301, all of which is viewable with the link originally provided in Counsel for the General Counsel's brief: https://www.nlrb.gov/case/09-CA-152301 (last visited January 28, 2019).

[4] JA 249, 548, 552.

[5] JA 245. The sequence of events confused the Administrative Law Judge and the NLRB in this case, leading to one of many repeated misapprehensions of fact. For instance, the ALJ assumed that manager Clyde Froslear's April 2015 statement about disciplinary procedures (the subject of case 09-CA-152301) was proximate in time to Rottinghouse's charge filing activity. But a careful reading of the record shows that it was not. Froslear's April 2015 statement bore no causal connection to

On July 7, 2015, Rottinghouse filed another ULP charge (case 09-CA-155497).[6] This one alleged that Airgas imposed the June 26, 2015 disciplinary suspension to retaliate against Rottinghouse for filing multiple charges[7] in violation of Sections 8(a)(1), (3) and (4). Despite management's restraint (working off the clock is a terminable offense[8]), Rottinghouse committed another serious DOT violation shortly thereafter demonstrating that he was as uninterested in correcting his

---

the Rottinghouse's protected charge filing activities, which Rottinghouse had last exercised 21 months prior to the charge in 09-CA-152301. The ALJ in case 09-CA-158662 (case of the written warning issued to Rottinghouse for an unsecured load and currently pending before this Court) credited manager David Leurhman's recollection of what Froslear said in the April 2015 meeting. The ALJ in this case (holiday pay), however, found that Froslear issued a threat to change working conditions, indicating unlawful animus. The Board adopted those findings as well. *See Airgas USA, LLC*, 366 NLRB No. 104, slip op. (2018) (Dissenting Member Marvin E. Kaplan noting "in a subsequent unfair labor practice proceeding involving the same parties, a different judge found that Froslear did make the alleged threat."). In both cases, the ALJ's made their findings based on credibility determinations. Given that the ALJ in this case explicitly based her animus finding on Froslear's alleged April 2015 statement (among other things), the panel decision inadvertently approved this bizarre result. To adopt this key ALJ finding in this case, the Board (and now this panel) should have vacated the ALJ's credibility findings in the other (or vice versa). The DC Circuit recently addressed this issue by remanding a case where the Board adopted an ALJ's pretext determination but without a key underpinning credibility finding. *See David Saxe Productions, LLC v. NLRB,* No. 16-1315 (D.C. Cir. 2018).

[6] JA 249.

[7] By specifying charges (plural) the charging party was again apparently tying this allegation to the charge he filed on August 7, 2013 in case 09-CA-110721.

[8] JA 548.

poor work performance as he was interested in exercising his right to file unfair labor practice charges.

On August 3, 2015 Rottinghouse drove onto the Cinday yard with an unsecured load in violation of Airgas Safety Policy, Airgas trainings, and federal DOT Regulations.[9] Having just endured Rottinghouse's reaction to the disciplinary action issued less than a month earlier for an equally severe violation of Airgas policy and DOT regulations (a grievance, a ULP charge, no improvement in work performance), Froslear reasonably decided to diligently document the deficiency rather than seek out Rottinghouse. Despite the fact that Rottinhouse had almost been terminated a month earlier for a similar deficiency, management again exercised restraint and issued a written warning for this incident (mysteriously, when Counsel for the General Counsel issued a complaint in this matter, it was on the theory that this disciplinary action should have been a verbal warning rather than a written warning; yet Counsel for the General Counsel

[9] JA 261265; 49 CFR §393.102(b).

contemporaneously dismissed a nearly identical charge concerning a three-day suspension).[10]

On August 6, 2015, Rottinghouse filed a grievance protesting the write-up. During the Step 2 grievance meeting the professional Union Representative admitted the severity of Rottinghouse's deficiency and conceded that some level of discipline was warranted but urged Froslear to reduce it to a verbal warning.[11] Froslear refused because of the severity of the deficiency and because it was the second DOT infraction in less than a month.[12] The Union chose not to proceed to arbitration and abandoned the matter, but Rottinghouse filed another ULP charge (case 09-CA-158662).

In the new charge – filed on August 24, 2015 – Rottinghouse alleged that Aigas wrote him up on August 3, 2015 in retaliation for his protected activity.[13]

On September 22, 2015, Region 9 dismissed the ULP in the suspension case (Case 09-CA-155497).[14] Rottinghouse immediately

[10] *See* fn. 15 below.
[11] JA 554.
[12] Id.
[13] JA 460.
[14] JA 552.

appealed to the General Counsel in Washington, DC. On November 5, 2015, the General Counsel denied Rottinghouse's appeal, by stating, in part: "There was no objective evidence of hostility linking the Employer's Decision to Rottinghouse's participation in Board activities." Despite this lack of evidence, just two weeks later, Region 9 issued a complaint in the ULP write-up case (Case 09-CA-158662).[15]

In November of 2016, Rottinghouse was absent on a scheduled work day that he needed to work in order to receive Thanksgiving holiday pay. Terms of employment and working conditions in Cinday are governed by a long-standing collective bargaining agreement between Airgas and Teamsters Local 100.[16] Under the plain language of the CBA's holiday pay provision, an employee must work the last scheduled work day preceding a holiday and the first scheduled work

[15] Although a full exploration of this incongruity is beyond the scope of this Petition, Counsel for Airgas contends that the decision of Region 9 to issue a Complaint on the 8(a)(4) allegation in Case 09-CA-158662 just two weeks after the General Counsel dismissed an appeal of a nearly identical allegation in Case 09-CA-155497 (and further never tried to reopen that case) justifiably raises employer questions about prosecutorial discretion. See NLRB Casehandling Manual (Part One) Dismissal Letters Sec. 10122.2 (providing for dismissal of charge "insufficient evidence to establish a violation"); Reopening of Dismissed or Withdrawn Cases Sec. 10121 (providing procedures for reinstating charges that have been dismissed), https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1727/ulpmanual-september2018.pdf (last visited January 28, 2019).

[16] JA 444, 684.

day following the holiday.[17] Article III, Section 3 of the CBA allows for only one exception to this rule: where an employee produces documentation from a health care provider that an injury or illness caused the unexpected absence.[18]

Rottinghouse was scheduled to work on Wednesday, November 23, 2016, his last scheduled work date prior to the Thanksgiving holiday. He was also scheduled to work on Monday, November 28, 2016, his first scheduled work day falling after the holiday. Under the CBA, Rottinghouse had to either work both of these days or produce a medical excuse for not working one or both. Instead, he did neither.[19] As a result, Article III of the CBA mandated that Rottinghouse became ineligible for Thanksgiving holiday pay when he neither worked on Wednesday, November 23, 2016 nor produced a medical excuse for his absence.[20]

---

[17] JA 182-190, 448, 688.
[18] JA 201-203, 448, 688. Unrebutted testimony in the record confirms that the only way an employee could call off unexpectedly right before or right after a holiday and still receive holiday pay is by bringing in medical documentation from their health care provider. JA 170-172, 202-203, 288, 443, 448, 688. During negotiations for the current CBA, the parties did not modify the long-standing holiday pay provision. JA 101-106, 448, 688.
[19] JA 29-30.
[20] JA 49, 193-194, 448-449.

ARGUMENT AND AUTHORITIES

I. The Panel Decision conflicts with Supreme Court Precedent and Section 7(c) of the Administrative Procedure Act by improperly relieving the General Counsel of the burden of persuasion

Under section 7(c) of the Administrative Procedure Act, "the proponent of a rule or order has the burden of proof."[21] In *Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, the Supreme Court held that "burden of proof" used in Section 7(c) means the burden of persuasion.[22] Thus, in any case subject to the *Wright Line*[23] analysis, the General Counsel bears the burden of proof throughout the case.[24]

Counsel for the General Counsel failed to call a single witness to present direct testimony that (1) he or she used an unscheduled personal day on his or her last scheduled work day preceding a holiday or on his or her first scheduled work day after a holiday, (2) did not

---

[21] 5 U.S.C. § 556(d) (2011); *Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994).
[22] 512 U.S. 267, 269 (1994).
[23] *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).
[24] *Southwest Merchandising Corp. v. NLRB*, 53 F.3d 1334, 1340 n. 8 (1995).

provide medical documentation to cover the resulting absence, and (3) still received holiday pay. The only such "evidence" on the record is the hearsay testimony of the General Counsel's witnesses and the single mistake (out of dozens holiday-related personal days analyzed in preparation for trial) identified by Plant Manager Todd Allender during direct examination as, essentially, the exception that proves the rule. Under *Greenwich Colliers* a pretext finding may still form part of the General Counsel's case, but adverse credibility findings are insufficient to stand in for missing affirmative evidence.[25]

By basing its holding on the ALJ's credibility findings and hearsay testimony while ignoring both the plain meaning of the CBA and the unrefuted testimony of Todd Allender, the Board improperly relieved Counsel for the General Counsel of the burden of persuasion in this case. By sustaining this error, the panel decision conflicts with the requirements of the APA and the Supreme Court's decision in *Greenwich Colliers*.

[25] The NLRB recognized this long ago when it held that an ALJ's disbelief of a denial "does not, of course, convert a denial into affirmative evidence." *Associated Musicians of Greater New York*, 212 NLRB 645, 646 (1974).

II. The Panel Decision, by ignoring principles of labor contract interpretation and imposing on the employer the burden of disproving improper motive, conflicts with Section 10(c) of the NLRA

Section 10(c) of the NLRA requires unfair labor practice findings to be based on a "preponderance of the testimony."[26] By basing her finding of discrimination on the employer's failure of proof, the ALJ required the employer to prove that it had a legitimate reason to deny Rottinghouse holiday pay while ignoring the fact that the pretext finding was not based on any affirmative evidence (if, by contrast, the General Counsel presented direct testimony of an employee who had taken an unscheduled personal day before a holiday without a medical excuse and still received holiday pay, then the pretext finding would have rested on at least one piece of affirmative evidence).

In order to reduce judicial error, the plain meaning rule is often employed in statutory construction and labor contract interpretation; this principle requires that the meaning of a term be determined solely by attaching the plain or usual meaning to words that appear clear and unambiguous.[27] Where the contract language is clear, there is often no

---

[26] 29 USC § 160(c) (2011).

[27] *See generally*, *International Union, United Auto., Aerospace & Agr. Implement Workers of America, Local 737 v. Auto Glass Employees Federal Credit Union*, 72

need to examine relatively less reliable extrinsic evidence. The most unreliable form of extrinsic evidence is adverse credibility findings such as a pretext determination in a *Wright Line* analysis.[28] In this case, by ignoring the clear meaning of the CBA's holiday pay language and instead making adverse credibility findings to compensate for the lack of affirmative evidence, the ALJ impermissibly flipped the burdens of proof by requiring the employer to *disprove* bad motive.

Counsel for the General Counsel failed to elicit a single example of direct testimony evidence from an employee who could testify the he or she (1) took an unscheduled personal day right before or right after a holiday, (2) did not provide management with medical documentation covering the unscheduled absence and (3) received holiday pay

F.3d 1243 (6th Cir. 1996); *NLRB v. U.S. Postal Service*, 833 F.2d 1195 (6th Cir. 1987); F. Elkouri & E. Elkouri, How Arbitration Works 348-50 (4th Ed. 1985).

[28] Nearly all of the ALJ's credibility findings in this case are inherently unreliable, contradictory and unsupported by affirmative evidence. For example, at one point she finds that "Froslear has no role in determining whether an employee will be paid or not be paid for a holiday" (JA 183, 712) only to later conclude that she will draw negative inferences against Airgas due to Airgas's "failure to present the testimony of a decision maker as to his motive in taking the alleged discriminatory action." JA 714-715. In this regard, the panel decision also conflicts with 6th Circuit precedent, which does not "permit the Board to ignore relevant evidence that detracts from its findings." *GGNSC Springfield LLC v. NLRB*, 721 F.3d 403, 407 (6th Cir. 2013). Indeed, the 6th Circuit requires itself to examine evidence in the record that runs contrary to the Board's findings and conclusions. *NLRB v. Seawin, Inc.*, 248 F.3d 551 (6th Cir. 2001) ("However, this court must review evidence in the record that runs contrary to the Board's findings and conclusions.").

nevertheless. This case should have been dismissed at the first stage of the *Wright Line* analysis. Instead, the ALJ and the Board improperly flipped the burden of persuasion in the *Wright Line* analysis by imposing upon Airgas the burden of proving it adhered to the plain meaning of the CBA; this would have required Airgas to elicit witness testimony (and the accompanying authentication of medical documents) demonstrating that every single time an employee took an unscheduled personal day and received holiday pay, it was because each employee provided medical documentation.

CONCLUSION

Rottinghouse did not receive holiday pay for the 2016 Thanksgiving holiday because the plain language of Article III, Section 3 of the collective bargaining agreement mandates that to receive holiday pay, an employee must work the regularly scheduled work day immediately preceding and immediately following a holiday. The NLRB, however, allowed an ALJ's pretext finding based entirely on the absence of proof to (1) override the longstanding shared understanding of the parties to a collective bargaining agreement, and (2) reverse the

evidentiary requirements mandated by two federal statutes and Supreme Court precedent.

Airgas does not have to prove that it did not possess an unlawful motive. Quite the opposite: the General Counsel must prove unlawful motive caused the adverse employment decision. Section 10(c) of the NLRA and Section 7(c) of the APA mandate that the ultimate burden of persuasion is on the General Counsel to prove that the employer's antiunion animus motivated the challenged action. The panel decision upends this standard by flipping the required evidentiary proofs.

For any one of these reasons, the Court should grant rehearing, grant Airgas's petition for review and deny the Board's cross-application for enforcement of its order against Airgas.

Respectfully submitted,

/s/ Michael C. Murphy
Michael C. Murphy
AIRGAS, INC.
259 N. Radnor-Chester Road
Radnor, PA 19087
(215) 990-4867
michael.murphy@airgas.com

Counsel for Petitioner Cross-Respondent Airgas USA, LLC

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(a)(5) because this brief contains 3,089 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 6 Cir. R. 32(b)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 in 14-point Century Schoolbook font.

/s/ Michael C. Murphy
Michael C. Murphy
AIRGAS, INC.
259 N. Radnor-Chester Road
Radnor, PA 19087
(215) 990-4867
michael.murphy@airgas.com

Counsel for Petitioner Cross-Respondent Airgas USA, LLC

CERTIFICATE OF SERVICE

I certify that on the 29th day of January 2019, pursuant to 6 Cir. R. 25, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to all parties indicated on the electronic filing receipt.

/s/ Michael C. Murphy
Michael C. Murphy
AIRGAS, INC.
259 N. Radnor-Chester Road
Radnor, PA 19087
(215) 990-4867
michael.murphy@airgas.com

Counsel for Petitioner Cross-Respondent Airgas USA, LLC